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No. 03-633
(CAPITAL CASE)

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

On Writ of Certiorari
to the Supreme Court of Missouri

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW
(Capital Case)

1. Once this Court holds that a particular punishment is not "cruel and unusual," and thus not barred by the Eighth and Fourteenth Amendments, can a lower court reach a contrary decision based on its own analysis of evolving standards?

2. Is the imposition of the death penalty on a person who commits a murder at age seventeen "cruel and unusual," and thus barred by the Eighth and Fourteenth Amendments?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The August 26, 2003 decision of the Supreme Court of Missouri is reported at 112 S.W.3d 397 (Mo. banc 2003) and is published in the Joint Appendix ("App.") at A-107.

JURISDICTION

The judgment of the Missouri Supreme Court was entered on August 26, 2003. (App. at A-107, A-151). The petition for writ of certiorari was filed on October 24, 2003, and was granted on January 26, 2004. This court has jurisdiction under 28 U.S.C. § 1257(a) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Constitution of the United States, Amendment XIV, § 1:

> [N]or shall any state deprive any person of life, liberty or property without due process of law .
> . . .

Mo. Rev. Stat. § 565.020 (1994):

> 1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.
>
> 2. Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; except that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

STATEMENT OF THE CASE

Respondent Christopher Simmons was convicted of a murder he committed while seventeen years of age. After his conviction was upheld, he sought a writ of habeas corpus from the Supreme Court of Missouri. That court granted the writ and resentenced Simmons to life imprisonment. In doing so, the court relied on the Eighth Amendment to the United States Constitution – despite contrary, binding precedent from this Court.

1. The Murder

The Missouri Supreme Court described the murder of Shirley Crook in its direct appeal opinion affirming Simmons's murder conviction and death sentence. (App. A-21 to A-25). In summary, those facts are as follows:

In early September 1993, Simmons, then age seventeen (now 28), discussed with his friends, Charlie Benjamin, fifteen, and John Tessmer, sixteen, the possibility of committing a burglary and murdering someone. On several occasions, Simmons described his planned crime: find someone to burglarize, tie the victim up, and ultimately push the victim off a bridge. Simmons assured his friends that their status as juveniles would allow them to "get away with it."

On September 8, 1993, Simmons arranged to meet Benjamin and Tessmer at around 2:00 a.m. to carry out Simmons's plan. The trio met at the home of Brian Moomey. When Simmons and Benjamin left to commit the burglary, Tessmer returned home.

Simmons and Benjamin found a window cracked open at the rear of Shirley Crook's home. They opened the window, reached through, unlocked the back door, and entered the house.

Simmons turned on a hallway light; the light awakened Mrs. Crook, who was home alone. She sat up in bed and asked, "Who's there?" Simmons entered her bedroom and recognized Mrs. Crook as a woman with whom he had previously had an automobile accident. Mrs. Crook apparently recognized Simmons as well.

Simmons ordered Mrs. Crook out of bed and, when she did not comply, Simmons forced her to the floor with Benjamin's help. While Benjamin guarded Mrs. Crook in the bedroom, Simmons found a roll of duct tape, returned to the bedroom, and bound her hands behind her back. The two also taped shut Mrs. Crook's eyes and mouth. They placed Mrs. Crook in the back of her minivan. Simmons drove the van from Mrs. Crook's home in Jefferson County to Castlewood State Park in St. Louis County.

Simmons parked the van near a railroad trestle that spanned the Meramec River. When he and Benjamin began to unload Mrs. Crook, they discovered that she had freed her hands and had removed some of the duct tape from her face. Using Mrs. Crook's purse strap, the belt from her bathrobe, a towel from the back of the minivan, and some electrical wire found on the trestle, Simmons and Benjamin bound Mrs. Crook again, restraining her hands and feet and covering her head with a towel. Simmons and Benjamin walked Mrs. Crook to the railroad trestle. There, Simmons bound her hands and feet together, hog-tied fashion, with the electrical cable, and covered her face completely with duct tape. Simmons then pushed her off the railroad trestle into the river below. At the time she fell, Mrs. Crook was alive and conscious. Simmons and Benjamin threw Mrs. Crook's purse into the woods and drove the van back to the mobile home park across from the subdivision in which Mrs. Crook lived.

Later that day, Simmons returned to Moomey's home

and bragged that he had killed a woman "because the bitch seen my face." Meanwhile, Mrs. Crook's husband Steven returned home from an overnight trip and discovered that she had not gone to work as scheduled. When he did not hear from her by that evening, he filed a missing person's report.

That same afternoon, two fishermen found Mrs. Crook's body floating in the Meramec River, three quarters of a mile downstream from the railroad trestle. The fishermen notified authorities, who removed the body. The medical examiner identified the body, determined the cause of death as drowning, and noted that the victim was alive before being pushed from the bridge. The examiner also reported that Mrs. Crook had sustained several fractured ribs and considerable bruising, injuries that did not result from her fall from the railroad trestle.

The next day, September 10, police learned that Simmons was involved in the murder. They arrested Simmons and took him to the Fenton Police Department. Police read Simmons the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Simmons waived his constitutional right to counsel and confessed to the murder. He also agreed to videotape a confession and to take part in a videotaped "reenactment" of the murder at the crime scene.

2. The Trial, Post-conviction Proceedings, Appeals, and Federal Habeas

At trial,[1] the jury found Simmons guilty of first degree murder and recommended a sentence of death. The jury found three statutory aggravating circumstances in the murder of Shirley Crook: (1) it was committed for the purpose of receiving money or any other thing of value; (2) it was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of Simmons; and (3) it involved depravity of mind, and as a result, the murder was outrageously and wantonly vile, horrible, and inhuman. (App. A-18). Following the jury's recommendation, the trial court sentenced Simmons to death.

Simmons filed a motion for post-conviction relief under Missouri Supreme Court Rule 29.15. After an evidentiary hearing, the circuit court denied the motion.

Simmons took a consolidated appeal to the Supreme Court of Missouri. That court affirmed Simmons's conviction and sentence and affirmed the denial of post-conviction relief. *State v. Simmons*, 944 S.W.2d 165 (Mo. banc 1997). This Court denied review. *Simmons v. Missouri*, 522 U.S. 953 (1997).

Simmons filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 (2000) in the United States District Court for the Eastern District of Missouri. That court denied the petition.

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[1] **The trial was not held in juvenile court because Simmons was not a "juvenile" under Missouri law. (*See* App. A-109 n.2). For a Missouri juvenile court to have jurisdiction, the offender must be sixteen or younger at the time of the offense. Mo. Rev. Stat. § 211.031.1 (2000) (jurisdiction of juvenile court), § 211.021(1), (2) (2000) (defining "adult" and "child").**

Simmons v. Bowersox, No. 4:97-CV-2415 JCH (E.D. Mo. Aug. 5, 1999). The United States Court of Appeals for the Eighth Circuit affirmed the denial. *Simmons v. Bowersox*, 235 F.3d 1124 (8th Cir. 2001). This Court denied review. *Simmons v. Luebbers*, 534 U.S. 924 (2001).

3. State Habeas

The present litigation began on May 3, 2002, when Simmons filed a petition for writ of habeas corpus with the Supreme Court of Missouri under that court's Rules 91.01(b) and 91.02(b). After receiving memoranda from Simmons and the State, the court issued a writ of habeas corpus. The State then filed a return.

On August 26, 2003, the court set aside Simmons's death sentence and resentenced him to life imprisonment without eligibility for probation, parole, or relief except by act of the Governor. According to the Missouri court, Simmons's Eighth Amendment rights were violated by his capital sentence because he was seventeen when he murdered Mrs. Crook. Writing for the dissent, Judge Price found the issue controlled by this Court's decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989).

SUMMARY OF THE ARGUMENT

The people in many states have chosen, through their legislatures, to make capital punishment available to prosecutors and juries when they find persons guilty of committing heinous crimes at age seventeen. This Court affirmed that choice in *Stanford v. Kentucky*, 492 U.S. 361 (1989). Even without the existence of *Stanford*, respondent Simmons would bear the "heavy burden [that] rests on those who would attack the judgment of the representatives of the people." *Gregg v. Georgia*, 428 U.S. 153, 175 (1976). Because of *Stanford*, Simmons bears the additional burden of justifying abandonment of the principle of stare decisis.

But the most important question here goes to the impact this Court's precedents have on lower courts. The Supreme Court of Missouri assumed authority to effectively overrule this Court's interpretation of the Constitution in *Stanford* in favor of its own. That is wrong. Even though Simmons's argument invoked the Eighth Amendment, with its evolving standards, it is for this Court, and not lower courts, to declare whether a particular punishment – here, capital sentences for those who commit heinous murders while seventeen years old – has become "cruel and unusual" and is thus newly barred by the Eighth Amendment. The Missouri court's action trivialized this Court's power and the command of its precedent.

Moreover, the Court should not abandon *Stanford*. States, prosecutors, and juries have relied on that precedent for the last fifteen years. The Missouri court did not find that any of the traditional bases for departing from stare decisis existed. Instead, it concluded that societal standards have evolved to the point that *Stanford* is no longer good law. That conclusion is incorrect.

This Court has consistently and appropriately refused to

declare a particular punishment "cruel and unusual" unless and until there is a national consensus to that effect. To determine whether there is a consensus, the Court looks at the objective record in two areas: legislative action and jury verdicts.

In *Stanford*, the Court concluded that legislative acts did not demonstrate a consensus against capital punishment for those who commit crimes at age sixteen. Since *Stanford*, a few state legislatures have raised the minimum age from sixteen to eighteen. But most have retained the age limit affirmed in *Stanford*; the picture has not appreciably changed. The Missouri court found otherwise, but to do so it had to include in its total one state where a court, not the legislature, raised the age, and two states that did not change the age at all, but merely rejoined the capital punishment states without modifying age distinctions they had previously made in non-capital sentencing. Meanwhile, other states reaffirmed, legislatively, the sixteen-year-old age limit. And voters in other States that had placed the line at eighteen chose to make capital punishment available to younger criminals. Meanwhile, the United States Senate, working with the president, preserved the ability of the States to make those choices. Those legislative acts confirm that the consensus the Court looked for in *Stanford* still does not exist.

Jury verdicts confirm that result. Capital sentences and executions of those who commit crimes before age eighteen are more common today than they were when the Court decided *Stanford*.

Although this Court has focused on the objective evidence of consensus in those two areas, it has also addressed other considerations. But these, too, show no appreciable change since *Stanford*. Capital punishment serves societal interests today just as it did in 1989. Polling data leads to the ambiguous conclusion that many oppose capital punishment for juveniles in the abstract, but they support it when faced with

specific cases. Some self-appointed expert groups opine that the practice should be barred, but they do not speak with the authority of a legislature and their opinions do not establish a national consensus. And though foreign countries that have capital punishment may have chosen a higher minimum age, the question here is whether there is an American consensus that a particular age is mandated by the United States Constitution.

If there is an American consensus today, it is a consensus that the States should be allowed to preserve capital punishment for use in the extraordinary case where a seventeen-year-old commits a particularly heinous crime.

ARGUMENT

I.

Lower courts should be bound by this Court's Eighth Amendment precedents, not set free to create a patchwork of differing constitutional rules, reflecting their own changing and subjective views of what constitutes "cruel and unusual punishment."

Decisions of this Court interpreting the Constitution are, of course, the supreme law of the land. U.S. Const. Art. VI; *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). In 1989, this Court held that the Eighth Amendment did not preclude the death penalty for individuals who murder at sixteen or seventeen years of age. *Stanford v. Kentucky*, 492 U.S. 361 (1989). Whether that holding is still the law of the land is a decision for this Court to make, not a decision for an inferior state or federal court. "[I]t is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). That is true even if "'changes in judicial doctrine' ha[ve] significantly undermined" this Court's prior holding, *United States v. Hatter*, 532 U.S. 557, 567 (2001) (quoting *Hatter v. United States*, 64 F.3d 647, 650 (Fed. Cir. 1995)); even if this Court's prior holding "appears to rest on reasons rejected in some other line of decisions," *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); and even if this Court's holding rests on "'increasingly wobbly, moth-eaten foundations,'" *State Oil Co. v. Khan*, 522 U.S. at 20 (quoting *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996)).

In startling contrast to these principles, here the Supreme Court of Missouri recognized this Court's precedent, but declined to follow it. The Missouri court acknowledged this Court's holding: that the Eighth Amendment does not

prohibit the execution of sixteen- and seventeen-year-old individuals who murder . (App. A-107, citing *Stanford*, 492 U.S. at 361 (1989); it nevertheless developed and applied the opposite rule: that the Eighth Amendment prohibits the execution of sixteen- and seventeen-year-old murderers. (App. A-109). The Supreme Court of Missouri reached this holding even though this Court declined to overturn *Stanford* three times within the year before the Missouri court ruled. *See Mullin v. Hain*, 538 U.S. 957 (2003) (Mem. Order) (order granting application to vacate stay of execution of defendant who was seventeen when he committed murder); *In re Stanford*, 537 U.S. 968 (2002) (denying writ of habeas corpus of petitioner who was seventeen when he committed murder); *Patterson v. Texas*, 536 U.S. 984 (2002) (same).

The Supreme Court of Missouri rationalized its action by suggesting that the question of whether the Eighth Amendment prohibits the execution of those who murder just before turning eighteen has become, since 1989, an undecided question. (App. A-121). The Missouri court concluded that while the issue had been decided in *Stanford*, it is undecided today because the Eighth Amendment should be interpreted "in a flexible and dynamic manner." (App. A-121, quoting *Stanford*, 492 U.S. at 369).

This analysis by a lower court belittles this Court's role as the Nation's highest court. This Court has never suggested that the precedential value of its Eighth Amendment decisions is less than that of its decisions in other areas. That the Eighth Amendment should be interpreted "in a flexible and dynamic manner" does not license lower courts to interpret that amendment contrary to what they would concede in every other context to be binding precedent from this Court.

Allowing lower courts to reinterpret the Eighth Amendment contrary to this Court's holdings would leave them

free to create their own definitions of "cruel and unusual punishment." There is little likelihood that those courts would reach unanimity on the most serious questions regarding Eighth Amendment protection. That lack of consensus would force this Court to review Eighth Amendment issues even more frequently. But such reexamination would, in turn, have little effect, for the lower courts would have license to again deviate from those renewed precedents.

Such deviations from a national norm are distinguishable, of course, from states creating additional rights for offenders through the legislative process or through their state constitutions. A state court may, without implicating the federal constitution, interpret the statutes, constitution, or common law of its state in a manner that creates additional rights for the offender. But a state court should not be free to decide a federal constitutional issue contrary to precedent from this Court. "It is, after all, a national Constitution [this Court is] expounding." *Jacobellis v. Ohio* 378 U.S. 184, 195 (1964). A "national Constitution" requires national rules.

The Supreme Court of Missouri did not merely suggest that it was free to reinterpret the national constitution; it concluded that it was obligated to do so – *i.e.*, that it was required to reconsider the Eighth Amendment issue decided in *Stanford* on the basis of any "evolving national consensus" it might find in 2003. (App. A-122). The evolving-standard-of-decency principle is, of course, the one this Court has long used in resolving Eighth Amendment issues. *See, e.g., Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion). And it is an appropriate standard for a lower court to use when this Court has not decided an Eighth Amendment issue. But when this Court has determined that a punishment does or does not violate the Cruel and Unusual Punishment Clause, a lower court should not be free to reanalyze and redecide the issue merely because there is some evidence that the standard has evolved.

Instead, the lower court should apply the controlling precedent - and leave it to this Court to decide when the standard has changed. If a state court wants to protect a young defendant by extending protections this Court has refused, it should do so on state, not federal, constitutional grounds. *See, e.g., Allen v. State*, 636 So.2d 494 (Fla. 1994); *see infra* p. 26.

II.

Principles of stare decisis argue against reversing the holding in *Stanford v. Kentucky*.

Principles of stare decisis create a general obligation to follow prior precedent – in this case, an obligation to follow *Stanford v. Kentucky*. The bright line in *Stanford* has proved workable since 1989. Stare decisis generally requires that such workable lines be retained. *See Planned Parenthood v. Casey*, 505 U.S. 833, 845, 854 (1992). None of the traditional factors that this Court examines in determining whether to overrule a prior decision (*see id.* at 854-59) weighs in favor of overruling *Stanford*.

The decision in *Stanford* led to the kind of reliance that argues against overruling it. *See, e.g., United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924). Most notably, state legislatures have relied on this Court's holding in *Stanford* when enacting or considering criminal laws. For example, the Missouri legislature relied on *Stanford* when it amended its first degree murder statute in 1990 to prohibit capital punishment for those who murder before their sixteenth birthday. *See* Mo. Rev. Stat. § 565.020.2 (1994). And presidents and the U.S. Senate have relied on *Stanford* when addressing international treaty issues. *See infra* at 27-28.

This is not an instance in which a legal rule has changed or been found to rest on an erroneous premise, so as to undercut

the foundation for a prior holding. The principles on which *Stanford* is based are not the remnant of some abandoned doctrine. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173-74 (1989). *Stanford* was based on principles articulated by this Court in *Trop v. Dulles* and *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). *See Stanford*, 492 U.S. at 369. No decision from this Court (or, for that matter, a lower court) has described *Stanford* as a deviation from the line of Eighth Amendment cases that began with *Trop*. Nor has the Court departed from the *Stanford* iteration of the *Trop* rule. Indeed, to the contrary, the Court cited *Stanford* with approval in *Atkins v. Virginia*, 536 U.S. 304, 315 n.18 (2002). Legislatures should be allowed to proceed as *Stanford* permits.

III.

Reversing the *Stanford v. Kentucky* holding could be justified only if there were a contrary national consensus against capital punishment for killers who are seventeen when they murder – and there is no such consensus.

A. Particular punishments are barred by the Eighth Amendment only when there is a national consensus that they are impermissible.

Though the Eighth Amendment bars "cruel and unusual punishments," it does not identify, nor provide criteria for identifying, such punishments. Certainly the list includes those punishments considered cruel and unusual when the Bill of Rights was adopted. *Stanford*, 492 U.S. at 368; *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). *See also Crawford v. Washington*, 124 S.Ct. 1354, 1373-74 (2004) (scope of Sixth Amendment's Confrontation Clause's protection to accused defined by Framers' intent). But capital punishment for one

who murdered at age seventeen was not considered cruel and unusual at that time. *Stanford*, 492 U.S. at 368.

This Court has repeatedly held, of course, that the list of banned punishments was not fixed in 1789. Rather, it changes as societal views evolve:

> [T]he [Eighth] Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that "a principle to be vital, must be capable of wider application than the mischief which gave it birth." Thus the Clause forbidding "cruel and unusual" punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."

Gregg v. Georgia, 428 U.S. at 171 (citation omitted) (quoting *Weems v. United States*, 217 U.S. 349, 373, 378 (1910)). The Eighth Amendment draws its meaning "from the evolving standards of decency that mark the progress of a maturing society." *Gregg*, 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. at 101).

Determining the "standard of decency" requires an assessment of contemporary values about the infliction of the sanction. *Gregg*, 428 U.S. at 173. Necessarily, however, the Court has articulated a standard that this assessment must reach. It is not enough to find some who say that a particular punishment is "cruel and unusual." Nor has it ever been enough that many, or perhaps even most, hold that value. Nor has the Court, in the Eighth Amendment context, been willing to rely on research or data purportedly validating those views.

Rather, this Court's modern Eighth Amendment opinions have consistently searched for a "national consensus."

See Atkins v. Virginia, 536 U.S. at 317; *Stanford*, 492 U.S. at 381 (O'Connor, J. concurring); *Penry v. Lynaugh*, 492 U.S. at 334 (1989). Were it to demand anything short of a "national consensus," this Court would itself be declaring something to be a "cruel and unusual punishment," rather than deciding whether a particular punishment has achieved that status.

Demanding a consensus is particularly important because the Eighth Amendment may be a one-way ratchet – *i.e.*, once a punishment reaches the "cruel and unusual" list, it may never come off, no matter how society's view of it may change. As this Court observed in *Gregg v. Georgia*:

> A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment. The ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off. Revisions cannot be made in the light of further experience.

428 U.S. at 176; *see also Thompson v. Oklahoma*, 487 U.S. 815, 855 (1988) (O'Connor, J., concurring in judgment) (observing that if the Court in 1972 would have held that a national consensus existed to outlaw capital punishment, then this "mistaken premise . . . would have been frozen into constitutional law"). If that is true, the Court must not allow the personal preferences of its current Members guide its decision (although that temptation is great; *see Furman v. Georgia*, 408 U.S. 238, 411 (1972) (Blackmun, J., dissenting)). The Court should not itself become "the ultimate arbiter of the standards of criminal responsibility. . . throughout the country." *Gregg v. Georgia*, 428 U.S. at 175-76 (quoting *Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion)); *see also Thompson v. Oklahoma*, 487 U.S. at 854 (O'Connor, J., concurring in

judgment) ("I would not substitute our inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the Nation's legislatures.").

To avoid becoming the "ultimate arbiter," making things "cruel and unusual" by judicial fiat, the Court must adopt and apply rules that accommodate legislative movement in more than one direction. Societal views of law enforcement standards do change, as reflected in legislation. As discussed below, *infra* at p. 22-27, states have moved both directions in determining the minimum age for particular punishments. They have made similar moves with regard to other punishment issues.

For example, the kind of punishment upheld in *Ewing v. California*, 538 U.S. 11 (2003), is stricter – perhaps far stricter – than its predecessor. *See id.* at 43 (Breyer, J., dissenting) ("between the end of World War II and 1994 (when California enacted the three strikes law), *no one* like Ewing could have served more than *10 years* in prison." (emphasis in original) (internal reference omitted)). Had the Court ruled before 1994 that a lengthy sentence was "cruel and unusual" merely because it was uncommon (or even unheard of), California would have been constitutionally barred from adopting what this Court so recently upheld.

Whether society's views have become so settled and uniform that there is a new "national consensus" that bars, perhaps forever, a particular punishment is not judged according to anyone's subjective views. Rather, courts must "look to objective indicia that reflect the public attitude toward a given sanction." *Gregg*, 428 U.S. at 173 (plurality opinion); *see also Penry*, 492 U.S. at 331 ("In discerning those 'evolving standards,' we have looked to objective evidence of how our society views a particular punishment today."); *Coker v.*

Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) ("Eighth Amendment judgments . . . should be informed by objective factors to the maximum possible extent."). This Court has focused on two areas for such indicia: legislative acts and jury verdicts. *See, e.g., Stanford*, 492 U.S. at 373; *Penry*, 492 U.S. at 331; *Atkins*, 536 U.S. at 312. The current data in those areas demonstrates no significant change since *Stanford*. There is still not "national consensus" – of the sort this Court has demanded – that it is "cruel and unusual" to impose capital punishment on any person who acts at age seventeen, no matter how heinous the crime.

B. Legislative activity since 1989 reflects the public's continued acceptance of capital punishment as an available sanction for those who murder at seventeen.

The Court has always mandated deference to legislative acts, even in the Eighth Amendment context. *See Stanford*, 492 U.S. at 369-70. Consistent with its own jurisprudence, this Court, in reviewing the decision below, should presume the validity of Missouri's law. Mo. Rev. Stat. § 565.020.2 (1994) (prohibiting capital punishment for those under sixteen). "And a heavy burden rests on those who would attack the judgment of the representatives of the people." *Gregg*, 428 U.S. at 175; *see also Stanford*, 492 U.S. at 373.

But in the Eighth Amendment context, turning first to legislative acts is not merely a matter of deferring to the will of the popularly elected branch. In the cacophony of personal opinions, the legislative voice is the only official expression of the people's will. It is the one voice we deem to be truly representative and collective. As this Court has noted, "the legislation enacted by the country's legislatures" is the "clearest and most reliable objective evidence of how our society views a particular punishment today." *Penry*, 492 U.S. at 331; *see also, e.g., McCleskey v. Kemp*, 481 U.S. 279, 300 (1987).

Thus, the Court explained in *Gregg*:

> "[I]n a democratic society, legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." The deference we owe to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy."

428 U.S. at 175-76 (citations omitted) (quoting *Furman*, 408 U.S. at 383 (Burger, C.J., dissenting)); *Gore v. United States*, 357 U.S. 386, 393 (1958). Consistent with *Gregg*, this Court has repeatedly said that it must listen, first and foremost, to the legislative voice when looking for a national consensus. *See, e.g.*, *Enmund v. Florida*, 458 U.S. 782, 789-93 (1982); *Tison v. Arizona*, 481 U.S. 137, 152-53 (1987); *Thompson v. Oklahoma*, 487 U.S. at 826-30; *Stanford*, 492 U.S. at 370.

If the Court is going to reconsider its *Stanford* holding, the first objective question, then, must be whether the Nation's legislatures have spoken in a way that is inconsistent with *Stanford*, *i.e.*, whether they have, since 1989, reached a consensus that any execution of a person who committed his crime before age 18 is "cruel and unusual."

The Court has posed parallel questions a number of times. For example, in *Coker v. Georgia*, the Court considered the States' statutory position with regard to capital punishment for rape. Of the thirty-five states that had at that point reenacted a post-*Furman* capital punishment scheme, only three had extended that scheme to cover rape of an adult woman. 433 U.S. at 594. Two of those had dropped that extension by the time the Court decided *Coker*, making Georgia the "sole jurisdiction in the United States . . . that authorize[d] a sentence

of death when the rape victim is an adult woman." *Id.* at 595-96.

Similarly, in *Enmund v. Florida*, the Court considered the legislative record as to capital punishment for felony murder. 458 U.S. at 789-93. Only eight states authorized capital punishment in a situation where the defendant did not kill, attempt to kill, or intend to kill. *Id.* at 792. And none of the states that had enacted new capital punishment statutes since 1978 had authorized that penalty for "a defendant who somehow participated in a robbery where a murder occurred." *Id.*

Even in *Atkins*, the Court followed this path, noting first that there was no record of "any state legislative consideration of the suitability of imposing the death penalty on mentally retarded offenders prior to 1986." 536 U.S. at 313. The Court then identified 19 state legislatures that had barred such executions since 1986 – and pointed out that none had gone the other direction. *Id.* at 314-17.

The Missouri Supreme Court claimed to be stepping in this Court's *Atkins* footprints. But in reality, it took a different route, for the kind of legislative record that was critical in *Coker*, *Enmund*, and *Atkins* was not available here. Rather, the record since *Stanford* is mixed.

In *Stanford*, this Court identified twelve states, out of thirty-seven that had capital punishment, that expressly excluded that penalty as an option for the seventeen-year-old offender. 492 U.S. at 370, 370 n.2. *See also Atkins*, 536 U.S. at 315 n. 18 (contrasting the post-*Penry* legislative record with regard to the mentally retarded and the *post-Stanford* record regarding "the threshold age for imposition of the death penalty."). Today, the situation is not appreciably different. We do not yet have a pattern of lawmaking sufficient to

establish a national consensus that capital punishment is "cruel and unusual" when imposed on anyone "so much as one day under" eighteen. *See Thompson*, 487 U.S. at 859 (Scalia, J., dissenting).

1. *Since* Stanford, *few states legislatures have raised the age for capital punishment.*

In holding that such a consensus now exists, the Supreme Court of Missouri concluded that five states had joined the *Stanford* list of twelve that barred capital punishment entirely when the defendant was under age eighteen at the time of the crime. In fact, only two legislatures had decided to raise the age for eligibility: Indiana and Montana. Ind. Code Ann. § 35-50-2-3(b)(1)(A) (West Supp. 2003); Mont. Code Ann. § 45-5-102(2) (2003). Two legislatures have more recently done so: South Dakota and Wyoming (2004 S.D. Laws Ch. 166 (S.B. 182); 2004 Wyo. Sess. Laws Ch. 29 (H.B. 5)). The legislatures in the other states listed by the Missouri court – Kansas, New York, and Washington – have not changed the age limit.

When this Court decided *Stanford*, Kansas was among the states that did not have capital punishment as a sentencing option. *See Thompson v. Oklahoma*, 487 U.S. at 826 n.25. When Kansas adopted its new capital punishment statute, the legislature did not deal specifically with offenders under eighteen; it merely carried over a distinction in its existing sentencing law. Previously, the maximum Kansas prison sentence was 40 years without parole, and Kansas exempted offenders under eighteen from that prison term. Kan. Stat. Ann. § 21-4622 (1990). When Kansas made capital punishment an alternative to the 40-year sentence, it did not modify the juvenile exception. Kan. Stat. Ann. § 21-4622 (1995). There was not a legislative vote in favor of any particular age.

New York, too, rejoined the capital punishment states

after *Stanford*. N.Y. Penal Law § 60.06 (McKinney 2004). And like Kansas, New York did not deal specifically with under-eighteen offenders. The maximum prior sentence was life imprisonment without parole. New York, like Kansas, had exempted offenders under eighteen from these prison terms. And New York, too, carried that over into its capital punishment law – though indirectly. New York's age limitation is not found in its sentencing law, but in the law defining the crime itself; since 1974, an element of first degree murder in New York has been that the offender be more than eighteen years old. *See* N.Y. Penal Law § 125.27(1)(b) (McKinney, 2004); 1974 N.Y. Laws Ch. 367, § 2. In New York, a murderer under eighteen could not be convicted of first degree murder either before or after *Stanford*.

Neither Kansas nor New York raised its age for conviction and sentence for first degree murder since *Stanford*. Again, all they did was add capital punishment to existing sentencing regime. That is not a solid suggestion that the people of those states have recently concluded that capital punishment cannot be available for any person who commits a crime at age seventeen.

Washington provides even less support for the Missouri court's claimed new legislative consensus. The change that the Missouri court cites was not a legislative one at all. When the Washington legislature enacted its current death penalty statute in 1981, the legislature included no minimum age for death eligibility. 1981 Wash. Laws 535 (1981) (codified at Wash. Rev. Code Ann. § 10.95.030(2) (West 2004)). *Stanford* did not prompt a legislative change. Rather, the Supreme Court of Washington held the statute to be "unconstitutional as applied to defendants fifteen years or younger if interpreted to authorize imposition of the death penalty following decline of jurisdiction in juvenile court." *State v. Furman*, 858 P.2d 1092, 1103 (Wash. 1993). The state statutory scheme as written allowed a

person under sixteen to be tried as an adult and potentially sentenced to death. The Washington court concluded that it must declare unconstitutional a death sentence for any juvenile – even one who was seventeen at the time of his offense. *Id.* at 1096, 1103 (offense occurred two months before defendant's eighteenth birthday). Thus the threshold age for execution in Washington is now eighteen. But again the change was not the result of legislative action.

In sum, then, the Missouri court should not have suggested that Kansas, New York, or Washington raised the minimum age for capital punishment. In fact, nearly all of the states whose positions were important in *Stanford* still stand in the same place.

2. *Meanwhile, other states have legislatively confirmed sixteen as the minimum age, as permitted by* Stanford.

In *Atkins*, the Court looked not only to the current position of the states, but also to the pace and direction of change. Critical to the *Atkins* holding was "the consistency of the direction" in legislative acts. 536 U.S. at 315. Here, the movement is not in a consistent direction; instead of raising the age for capital punishment eligibility, various states have confirmed positions that were once merely implicit, or have even moved the other way. Indeed, the record today is not appreciably different from the record in 1989, when Justice O'Connor noted the phenomenon of states setting sixteen as the minimum age for capital punishment. *Stanford v. Kentucky*, 492 U.S. at 381 (O'Connor, J., concurring).

Since this Court's 1986 decision in *Thompson v. Oklahoma*, some state legislatures have set sixteen as their minimum age for the imposition of capital punishment. As noted above, *supra* at pp. 14, 19, in 1990, the Missouri

legislature established sixteen as its minimum age. *See* Mo. Rev. Stat. § 565.020.2 (1994). And in Virginia, the General Assembly amended its law in 2000 to expressly allow capital punishment for offenders who were sixteen years or older at the time of the offense. *See* Va. Code Ann. § 18.2-10(a)(2003); 2000 Va. Acts Ch. 361 (H.B. 978).

In Arizona, the people, acting as the legislature by initiative, made a parallel change, exposing more sixteen- and seventeen-year-old offenders to the possibility of capital punishment. On November 5, 1996, Arizona voters passed Ballot Proposition 102, the Juvenile Justice Initiative. It repealed former Arizona Constitution Article 6, § 15, which gave superior courts the authority to transfer a juvenile for prosecution. Under the new amendment, juveniles fifteen years of age or older who are accused of murder and other violent felony offenses would be prosecuted as adults. *See* Ariz. Const. art. 4, pt. 2, § 22(1). The voters' purpose in adopting the constitutional amendments was to speed the pace and to augment the effectiveness of the juvenile justice system in Arizona and to respond more stringently to juvenile crime when appropriate. *In re Cameron T.*, 949 P.2d 545, 550 (Ariz. Ct. App. 1997). Eliminating the discretionary step of the juvenile justice system and vesting mandatory criminal prosecution jurisdiction in the criminal trial court would have the effect of exposing more juvenile offenders to the possibility of capital punishment. That is, the amendment would divest the juvenile courts – which cannot impose capital punishment – of jurisdiction over certain juvenile offenders, including those charged with murder. *See also* Ariz. Rev. Stat. § 13-501 (2004) ("the county attorney shall bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is fifteen, sixteen or seventeen years of age and is accused of . . . first degree murder in violation of § 13-1105."). The amendment is the clearest expression of the people's voice.

Later, the Arizona Supreme Court rejected the amendment, but on grounds that cast no doubt on the people's meaning. The court held that the new procedures were insufficient to allow individualized consideration of the appropriate sentence, required by this Court in *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion). *See State v. Davolt*, 84 P.3d 456, 479-81 (Ariz. 2004). That judicial ruling, however, does not erase, for purposes of considering whether there is a new consensus, the legislative voice endorsing the availability of capital punishment for sixteen- and seventeen-year-old murderers.

In Florida, the process leading to a similar endorsement was prompted by judicial action. In *Allen v. State*, 636 So.2d 494 (Fla. 1994), the Florida Supreme Court concluded that a Florida statute allowing the death penalty for a fifteen year old violated Article I, § 17 of the Florida Constitution. *Id.* at 497. Section 17, as it then read, prohibited imposition of "cruel *or* unusual" punishment (emphasis added). That decision prompted a response by the people, in their legislative role.

In November 2002, Florida voters overwhelmingly approved a state constitutional amendment that changed the state constitutional standard from "cruel or unusual" to "cruel and unusual," mirroring the Eighth Amendment standard in the federal constitution. Florida Const. art. I, § 17 (as amended 2002); elections results available at http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/5/02&DATAMODE=. It was adopted when *Stanford* defined the scope of the Eighth Amendment with regard to capital punishment for those under eighteen. Thus the legislative decree in Florida effectively *lowered* the age of eligibility, to the level approved in *Stanford*.

That movement – especially when combined with states that affirmed, post-*Stanford*, the sixteen-year-old line –

demonstrates that here, unlike in *Atkins*, there is not a "consistency of direction" suggesting that we have reached a new "national consensus."

3. *Congress has maintained the availability of capital punishment for those who commit crimes at age seventeen.*

State legislatures are not, of course, the only legislative voice. The people also speak through their elected members in Congress. And since *Stanford*, the United States Senate, in cooperation with the President, has expressly preserved the States' ability to apply their own capital punishment laws to those who commit heinous crimes before turning eighteen.

For example, when the Senate ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992, it did so with a series of reservations, understandings, and declarations. These included specific reservation of the right to impose capital punishment on youthful offenders:

> [T]he United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishments for crimes committed by persons below eighteen years of age.

U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. 8070 (April 2, 1992). The reservations, understandings, and declarations were proposed by the President, adopted by the Senate as a condition of its advice and consent to the ICCPR, and included with the United States

Instrument of Ratification deposited with the United Nations. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights and Conditional Consent*, 149 U. Pa. L. Rev. 399, 404 (2000) (hereinafter "Bradley").[2]

Contemporaneous with *Stanford*, the United States was negotiating the text of the proposed United Nations Convention on the Rights of the Child. During these negotiations, the United States delegation objected to a proposed ban on juvenile executions, but did not insist on deletion of that provision "provided it was understood that the United States maintained its right to make a reservation on this point." The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Preparatoires" 465 (Sharon Detrict, ed., 1992). President Clinton signed the Convention in 1995, but stated that he would ask the Senate to attach "a number of reservations and understandings" to " protect the rights of various states under the nation's federal system of government and maintain the country's ability to use existing tools of the criminal justice system in appropriate cases." Press Release, White House Press Office, Statement on US Decision to Sign UN Convention on the Rights of the Child (Feb. 10, 1995). The Senate has not ratified the Convention Curtis A. Bradley, The Juvenile Death Penalty and International Law, 52 Duke L.J. 485, 512 (2002), and thus has declined to endorse the capital punishment ban that the Convention contains.

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[2] A final draft of ICCPR had been completed in 1966 and the treaty took effect in 1976, all without formal United States involvement. The United States had signed the ICCPR in 1977, but President Jimmy Carter quickly followed this signature with proposed conditions on the United States ratification, including a condition declining to agree to the juvenile death penalty provision. Message from the President of the United States Transmitting For Treaties Pertaining to Human Rights, S.Exec. Docs. C, D, E, and F, 95-2, at III-IV (1978).

* * *

Of course, it is not Missouri's burden to show a national consensus in favor of capital punishment for those who murder at seventeen. *See Stanford*, 492 U.S. at 373. But the foregoing amply demonstrates a different national consensus: one that preserves the ability of individual state legislatures to make that penalty available for the most heinous and dangerous crimes, even when committed by those who have not quite reached eighteen. That consensus is entirely inconsistent with the holding of the Supreme Court of Missouri.

C. Jurors continue to impose capital punishment contrary to the alleged consensus.

The second objective factor "the Court has examined in determining the acceptability of capital punishment to the American sensibility is the behavior of juries." *Thompson v. Oklahoma*, 487 U.S. at 831 (plurality opinion of Stevens, J.). Thus, in determining that there was not a national consensus against capital punishment of those offenders who were sixteen at the time of the murder, this Court looked at the rate of sentencing of those offenders. *Stanford*, 492 U.S. at 373-75. Similarly, in *Atkins,* the court looked at "[t]he practice" of imposing capital punishment on the mentally retarded. *Atkins*, 536 U.S. at 316. Noting the change in jury verdicts since *Penry*, in the *Atkins* Court determined that such verdicts pointed toward a consensus further limiting capital punishment for the mentally retarded. *Id.* But comparing current data with that considered in *Stanford* points the opposite direction here.[3]

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[3] Petitioner does not mean to suggest, by reference to the kind of data considered in *Stanford*, *Penry*, and *Atkins*, that such data tells us much about societal views about punishment, rather than about patterns of criminal activity. Perhaps such views could be accurately ascertained by comparing jury verdicts for comparable crimes committed by persons at various ages. But we

In *Stanford*, the Court looked first at the ages at which those who received capital sentences had committed their crimes. The Court noted that between 1982 and 1988, fifteen of the 2,106 death sentences were imposed on individuals who were sixteen years of age or younger. *Stanford*, 492 U.S. at 373. During that same time period thirty death sentences were imposed on those who were seventeen at the time of the crime. *Id.* These death sentences, 45 out of 2,106, represented 2.1% of the total sentences. *Id.*

Two people who were fifteen, 32 who were sixteen, and 89 people who were seventeen received capital sentences between 1990 and 2003. Victor Streib, The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 - March 15, 2004 at page 9 (Table 4) (March 15, 2004) (available on-line at http://www.law.onu.edu/faculty/streib/JuvDeathMar152004.pdf) (hereinafter "Streib").[4] Those aged fifteen, sixteen, and seventeen at the time they killed totaled 123 out of the total 359 death sentences for this period. *Id.* That is significantly more proportionately, than the 2.1% noted by the court in *Stanford*. This sentencing data points away from the consensus that the Supreme Court of Missouri purported to find.

In *Stanford*, the Court looked not only at sentencing, but at actual executions. The Court noted the actual executions for crimes committed under age eighteen accounted for 2% of the total number of executions between 1642 and 1986. *Stanford*, 492 U.S. at 373-74. Comparing that with the data for 1973 through 2003 reveals an upward trend. Since 1973, 22

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are aware of no such data.

[4]Actually, the number may be higher, Streib acknowledges that his data "almost invariably under-report the number of death sentenced juvenile offenders. . . ." Streib, *supra*, at page 2.

individuals who murdered at the ages of sixteen and seventeen have been executed, out of a total of 901 executions – a rate of 2.4%. Thus executions of those who were sixteen and seventeen years old at the time they murdered is 20% higher, as a proportion of total executions, than the historical rate of 2% noted by the court in *Stanford*. Streib, *supra*, at 4.

Finally, in *Stanford* the Court observed that the last execution of a person who committed a crime under seventeen years of age had occurred in 1959. 492 U.S. at 374. The question here, of course, is punishment for those who murder at seventeen. And the execution data there is telling: twenty-one since 1973. Streib, *supra*, at 4. Again, the data regarding actual executions points away from the kind of consensus for limiting capital punishment that this Court found in *Atkins* and the Missouri court found here.

Instead of looking at sentences and executions, as this Court did in *Stanford*, 492 U.S. at 373-74, the Supreme Court of Missouri looked only at the number of states that had actually conducted executions. Since 1985, seven states, including Missouri, had since 1985, executed an offender who was sixteen or seventeen at the time of the offense. Streib, *supra*, at 4. Nothing in that data supports the consensus that the Missouri court posits.

Even if counting states performing executions were the appropriate method of analysis, the data relied upon by the Missouri court would be insufficient. It severely understates the situation. Currently thirteen states – including Missouri – have individuals awaiting capital punishment who committed their crimes while under age eighteen. *Id.* at 24-30. There is no basis in the Missouri court's decision for supposing that the absence of such individuals from other states' lists is the result of juries' views regarding capital punishment. The fact remains that capital sentences and executions of those who commit

heinous crimes before turning eighteen are more common now than they were when *Stanford* was decided. The contemporary history of jury verdicts simply does not support the claim that imposing capital punishment on persons who commit heinous crimes shortly before turning eighteen has "become truly unusual," or that it would be "fair to say that a national consensus has developed against it." *Atkins*, 536 U.S. at 316.

D. A new consensus contrary to *Stanford* is unlikely, given that making capital punishment available as a penalty for those who, before turning eighteen, methodically commit the most heinous crimes serves society's interests in retribution and deterrence.

Moving away from objective indications of consensus, the Court has also addressed whether capital punishment for sixteen- or seventeen-year-old murderers serves the societal purposes that capital punishment fulfills. *See Ford v. Wainwright*, 477 U.S. 399, 409 (1986). Of course, in this respect, the Missouri court never implies that something has changed since 1989 to suggest that this Court was wrong on this point in *Stanford*, or that the analysis today should be any different. Nor does the Missouri court consider that whether a society should allow capital punishment as an option for any particular group of murderers is, in the first instance, a political question. Whether capital punishment in those circumstances effectively serves societal goals such as retribution and deterrence is a question better answered in legislative rather than in judicial forums. Nonetheless, to the extent the Supreme Court of Missouri assumed that role (*see* App. A-130 to A-131), it relied on faulty premises.

Initially, the Missouri court seems to have found that those who murder at age seventeen are less culpable as a class than those who murder at age eighteen. (App. A-131). This Court has rejected that contention, and the court below gives no

reason to set aside this Court's analysis. In *Stanford*, the Court rejected a constitutional policy of stereotyping on the basis of an offender being age sixteen or seventeen. 492 U.S. at 378. Instead, the Court recognized that the abilities of individual youth differ; thus, it should be up to the jury to determine the appropriate punishment. *See id.*

The correctness of this Court's conclusion – and the error in the assumption made below – seems obvious. Youth mature, but not in a uniform way. As the President's Commission on Law Enforcement and Administration of Justice concluded:

> [S]ome youths handled by juvenile courts are hardened, dangerous offenders, while some adults older than the arbitrary upper age are emotionally and sometimes physically immature individuals.... No chronological age bracket is uniformly identical or entirely homogenous.

The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967), at 119-20. *See also Fare v. Michael C.*, 442 U.S. 707, 734 n.4 (1979) (Powell, J., dissenting).

The variation in the maturation process minimizes the value of age, standing alone, as a basis for determining when capital punishment serves or fails to serve societal interest. "[A]ge is simply a 'proxy' for a combination of factors such as maturity, judgment, responsibility, and the capability to assess the possible consequences of one's conduct." Joseph L. Hoffmann, *On the Perils of Line Drawing: Juveniles and the Death Penalty*, 40 Hastings L.J. 229, 258 (1989). There is certainly a point at which age is an appropriate proxy for determining whether imposing capital punishment on an

individual makes sense, even without legislation. In the common law, it was age seven. *Thompson v. Oklahoma*, 487 U.S. at 864 (Scalia, J. dissenting), citing 4 Blackstone Commentaries *23-*24. Under the consensus recognized in *Thompson* and *Stanford*, it is sixteen.

But in general, the social question of the minimum age at which capital punishment can be imposed – even for most heinous crimes – is not one that can be answered with any certainty. Thus the Missouri legislature's post-*Stanford* decision to set the line at sixteen should be given substantial deference. *See Gregg v. Georgia*, 428 U.S. at 174-76. The legislatures in Missouri and elsewhere could rationally determine; given their review of social science literature and their statutes, and from their own experiences, that the societal purpose of retribution is fulfilled by capital punishment with the constitutional line drawn at sixteen. *See id.* at 186-87. And those legislatures could rationally determine that, with the sixteen- and seventeen-year-old offender, the need for specific deterrence and incapacitation is greater than for older offenders, because of the longer period in which the offender could reoffend.

Any such line is to some degree imprecise. If the courts push further into the business of establishing such lines, they will inevitably be faced with more and more questions. If the line is eighteen, why not twenty-one? Or thirty-five? Courts relying on such ephemeral concepts as the effectiveness of retribution and deterrence will find no principled place to stop. That legislatures have adopted different ages as proxy for maturity in other contexts provides no comfort in this respect. Missouri permits driving at age fifteen, and unsupervised driving at sixteen. (Mo. Rev. Stat. §§ 302.060(2), 302.130.1) (2000). It forbids use of alcohol until twenty-one (Mo. Rev. Stat. § 311.325 (2000)). Both are legislative judgments about the ability of persons to manage complex, peer-influenced

behavior and the threat such behavior poses to public safety. Tying a decision here to any one of the age limits imposed in other contexts will merely ensure myriad future cases citing as authority statutes setting higher limits in less relevant circumstances.[5]

Certainly nothing in the facts of this case suggests that the Missouri legislature's decision to set the line for capital punishment at the point approved in *Stanford* was irrational or inappropriate. Respondent Simmons did not act impulsively; he deliberately planned the burglary and murder. There is no indication that he was unable to control his emotions and is therefore less culpable. There is no indication that he was led in the crime by older individuals; to the contrary, Simmons recruited a fifteen and sixteen year old. The suggestion that Simmons was unable to perform the cost-benefit analysis associated with deterrence is unsupportable on the record here. That Simmons told others they could avoid the most serious punishment because they would be processed by the juvenile justice system shows his concern about potential sanctions for his wrongdoing and his misunderstanding of the reach of that system, not a deficient ability to understand the consequences of his actions.

Addressing deterrence, it is possible that the Missouri court concluded that because few seventeen year old offenders are executed, there is no deterrent effect. (App. A-133). Hopefully, the principal reason few seventeen-year-old offenders are subjected to capital punishment is because few commit, with the requisite mental state, capital crimes. Perhaps that is because the deterrent impact of even a few executions

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[5] That is particularly true as to references to state laws that are affected – or even coerced – by federal laws. *See, e.g.*, 23 U.S.C. § 158(a)(1) (2000).

has been great. Regardless, to use that data to suggest a diminished deterrent effect required the Missouri court to ignore the impact of even two years of maturation – two years that are important to juries. As noted earlier, the possibility of a seventeen-year-old offender being executed is significantly higher than it was for the fifteen-year-old offender in *Thompson v. Oklahoma*. Only five fifteen-year-old offenders are discussed in *Thompson*, 487 U.S. at 832-33; now 73 offenders (not including Simmons) who were sixteen or seventeen years old when they committed their crimes await execution. Streib, *supra*, at pages 3, 23-29.

To the traditional concerns with how capital punishment applied to a defined group serves societal interests in deterrence and retribution, the Missouri court, perhaps prompted by a brief reference in *Atkins*, 536 U.S. at 321, added a concern that "the risk of wrongful execution" existed with young offenders. (App. A-133). The court presented no authority for this proposition. And the court's analysis is facile. The court asserted that youthful defendants have had less time as compared to older ones to develop mitigating evidence. (App. A-133). That argument is a neutral one; youthful defendants have had less time to develop aggravating circumstances as well. Further, a youthful defendant would have had time to develop ties with local schools, counselors, coaches, and the like; thus, those defendants have ample ability to develop mitigating evidence. There is no categorical risk of error when youthful defendants are tried that would justify courts taking over the legislative role of defining the age at which persons, regardless of their crimes, should be subject to capital punishment.[6]

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[6] The court below also concluded that there was a risk of wrongful execution in this particular case because the government rebutted the mitigating aspect of petitioner's age at the time of the murder. (App. A-133). That point is misplaced on the record in this case. But even if it were supportable, the point could justify, at most, a rule regarding how mitigation evidence is presented and argued, not a blanket rule against capital punishment for those who commit crimes at seventeen.

But again, whether and how making capital punishment available as a penalty for some crimes committed by some seventeen year olds increases risks of error and serves society's interests in retribution and deterrence are not questions that can be answered by objective criteria. And though answering them may tell us whether there should be a national consensus allowing or disallowing such a penalty, they tell us little or nothing about whether there is a consensus one way or the other.

E. Other evidence cited by the Missouri Supreme Court is largely inapposite and entirely insufficient to demonstrate a new and different national consensus.

This Court has debated the appropriateness of looking anywhere beyond legislative acts and jury verdicts in determining what constitutes a consensus that standards have evolved to the point that a particular punishment now violates constitutional guarantees. Compare *Stanford*, 492 U.S. at 377 with *id.* at 391 (Brennan, J., dissenting). One area of debate has been whether and how the Court should evaluate the value of capital punishment in terms of retribution and deterrence. compare *Stanford*, 492 U.S. at 379-80 with *id.* at 403-05 (Brennan, J., dissenting). In the course of discussing the possibility of consensus, members of the Court have also mentioned other kinds of evidence. The Missouri court took the hints, and invoked various other sources in its search for consensus. Those sources are largely inapposite, their use is problematic, and ultimately they do not lead to the conclusion the Missouri court reached.

Polls and other social science research.

One basis cited by the Missouri court for its decision was political polls concerning support for the death penalty for juveniles. (App. A-i29). This Court has said, quite correctly, that political polling data is an uncertain foundation upon which to rest constitutional law. *Stanford*, 492 U.S. at 377. *See also Atkins v. Virginia*, 536 U.S. at 326-27 (Rehnquist, C.J., dissenting), and 328-37 (Appendix to Opinion of Rehnquist, C.J.). Justice Marshall observed that the utility of public opinion polls in ascertaining standards of decency "cannot be very great." *Furman v. Georgia*, 408 U.S. at 361 (Marshall, J., concurring). In *Atkins*, the Court's reference to polling data and the views of various social and professional organizations was relegated to a footnote, and the Court noted that "these factors are by no means dispositive." 536 U.S. at 316. But here, even if polls were dispositive, they would not demonstrate the consistency and accuracy necessary to support a claimed national consensus.

Perhaps reflecting concern about the rising rate of crime committed by juveniles, the 34% of Missourians who support capital punishment for juveniles (App. A-129; citing Juvenile Offender Public Opinion Survey, Center for Advanced Social Research, University of Missouri - Columbia (Mar. 2003) available at http://www.abanet.org/crimjust/juvjus/mopoll.pdf)) is substantially higher than the 1965 Gallup Survey that reported 23% favored the death penalty for persons under twenty-one years of age. Victor Streib, Death Penalty for Juveniles, 33 (1987). The issue before the Court is not whether a majority of the public supports or opposes capital punishment in these circumstances, a legislative issue, but whether it is "generally abhorrent to the conscience of the community." *Thompson v. Oklahoma*, 487 U.S. at 832. Assuming for the sake of argument that the 34% of Missourians figure cited by the Missouri court represents the current national view, more

than one person in three supports retaining authority to execute those who commit a capital homicide at age seventeen.

That polls do not prove a national consensus against imposing capital punishment on any person who commits any crime before turning eighteen is further demonstrated by the fact that the more specific or concrete the poll question is, the higher the response favoring use of capital punishment – and by fluctuations in public opinion, as people hear of particularly heinous crimes committed by young people. After the March 24, 1998 school shooting in Jonesburg, Arkansas, half of the Americans polled said that eleven- and thirteen-year-old boys should receive capital punishment. James Garbarino, Lost Boys 20 (1999). Similarly, when asked in the context of the D.C. sniper shooting whether a particular sixteen- or seventeen-year-old accused capital offender (Lee Boyd Malvo) should be executed if found guilty of a capital offense, the answer was overwhelmingly "yes." A Vote.com poll taken in the wake of the D.C. sniper shootings, asked whether we should "Abolish the death penalty for minors?" Seventy-six percent responded, "No! Murderers shouldn't be able to use age to limit punishment."[7] And the Harris Interactive survey for CNN and Time Magazine found that 51% of respondents supported the death penalty for suspected D.C. sniper Lee Boyd Malvo if he were found guilty.[8] Poll questions that inquire about executing "juveniles" or "minors" in general terms are not reliable indicators of public opinion about whether no sixteen- or seventeen-year-old criminal who commits premeditated murder

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[7] Vote.com poll results may be found at http://www.vote.com/vResults/index.phtml?voteID=49155414&cat=4075633.

[8] Results of the Harris Interactive survey are reported by the Death Penalty Information Center on their website: http://www.deathpenaltyinfo.org/article.php?scid=27&did=883.

should ever be eligible for the death penalty.

Social science research into juror voting, using hypothetical cases before ersatz jurors, also demonstrates societal acceptance of capital punishment of young offenders. *See* Catherine A. Crosby, et al., *The Juvenile Death Penalty and the Eighth Amendment*, 19 Law & Human Behavior 245 (1995). While only 60% of the study participants voted to execute the study's ten-year-old defendant, the figure rose to 90% in favor of capital punishment of the defendant who was sixteen years old. *Id.* at 254. Forty percent of juvenile court judges believe that the death penalty is warranted for some juvenile offenders. Rorie Sherman, Juvenile Judges Say: Time to Get Tough, The National L.J., Aug. 8, 1994, at A1. Such study and survey data, like polling data, reveals that there is no national consensus opposing capital punishment for offenders who murder at age seventeen.

Opinions of "expert" and self-selected interest groups.

The Missouri court also looked to the positions of lobbyist and special interest groups. (App. A-129). The court did not attempt to articulate the significance of counting the number of such groups in determining whether respondent had met his heavy burden of showing a national consensus opposing capital punishment for those who offend at ages sixteen and seventeen. And this Court wisely "decline[d] the invitation to rest constitutional law upon such uncertain foundations" in *Stanford*. 492 U.S. at 377. Courts should not be in the position of trying to determine whether a vote of a committee of the YMCA of the USA (App. A-129), and other groups with their inherent biases, constitutes meaningful evidence of a national consensus.

International views.

The Missouri court also took note of views of the international community in opposition to capital punishment. (App. A-130). The court below did not, nor could it, explain how such views reflect an American consensus that evolving standards of decency proscribe capital punishment for one who murders at seventeen.

To support its theory, the court below referred to Article 37(A) of the United Nations Convention on the Rights of the Child. (App. A-130). As discussed above, that treaty has not received the advice and consent of the United States Senate. *See supra* at p. 28. Indeed, "the United States is the only country in the world that has not yet ratified this international agreement, in large part because of our desire to remain free to retain the death penalty for juvenile offenders." Streib, *supra*, at 8.

The court below also found "of note" that two other countries allow capital punishment of those who offend when they are sixteen and seventeen. (App. A-130). Again, the court below did not, nor could it, explain how the justice practices of other countries, be they Iran or Congo or even Canada or Great Britain, show our national consensus for or against any particular limit on capital punishment. As the Court observed in *Stanford*, the Eighth Amendment inquiry is into the standard of decency in modern American society as a whole, not the standard in soc[illegible]ties in first, second, or third world countries. *Stanford*, 492 U.S. at 369 n.1. This Court has properly stated that in ascertaining the standard of decency of American society, courts should look to the political attitudes of our society, not of societies from around the globe. *Id.*

* * *

These kind of considerations, though discussed by this Court in the past, have never been the basis for a decision that American standards of decency have evolved so as to make any

particular punishment "cruel and unusual." At most, they have buttressed positions based on more objective indicia of a national consensus. To turn now to these ephemeral considerations would open the door to abuse and uncertainty – particularly were the Court, as discussed in point I, *supra*, to free the lower courts to reach their own independent and contradictory conclusions as to what the Eighth Amendment means.

CONCLUSION

For the reasons stated above, the Court should reverse the decision of the Missouri Supreme Court and reaffirm its holding in *Stanford v. Kentucky*.

Respectfully submitted,

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